The Published Opinions of Judge Terrence L. Michael

The following synopses are provided for the benefit and assistance of parties and attorneys who appear and practice in this Court. The synopses are brief and general in nature and may not be cited as authority in and of themselves. They are not intended to be a substitute for a review of the opinions in their entirety.

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1. *In re Diviney*, 211 B.R. 951 (August 19, 1997) *affirmed*, *In Re Diviney*, 225 B.R. 762 (10th Cir. BAP (Okla.) 1998).

   ISSUE: The questions presented to the court were: (1) whether a bank, at the time of repossession, held a security interest in the motor vehicle; and (2) whether damages should be assessed the bank pursuant to § 362(h).

   RULING: The court concluded that damages under § 362(h) were appropriate because the bank had violated "one of the fundamental debtor protections provided by the bankruptcy laws," which is the automatic stay provision of § 362. The facts indicated that the reinstatement of the Chapter 13 plan had occurred and notice was given to all parties with an interest in the estate, including the bank; that the car was the property of the bankruptcy estate subject to the automatic stay provision; and that the sale of the vehicle after repossession was not the enforcement of a valid lien, but the unauthorized taking of the estate's property. The court finally concluded that the conduct of the bank was "willful" and that punitive damages in the amount of $40,000 was appropriate.

2. *In re Limited Gaming of America, Inc.*, 213 B.R. 369 (October 1, 1997).

   ISSUE: Whether the IRS should be allowed to file an out-of-time claim for unpaid income taxes for two separate years against a Chapter 11 estate some thirteen months after the claims bar date had expired; or whether the IRS should be granted leave to file an amended proof of claim to include those amounts.

   RULING: The court held that each year constitutes a separate claim in terms of income tax debt. The court then held that there were certain objective factors to help aid in the determination that an amendment is necessary in such situations, and that many of the factors in the case indicated that amendment was not proper (e.g., the IRS did not

present proper notice that its first claim was only an estimate, that the increase in the figure would create a windfall for the IRS against other non-priority creditors, and that it would be inequitable to allow such an amendment because the facts indicate that the amended amount is essentially a new claim). The court further held that the "excusable neglect" excuse contained in F. Bankr. R. 9006(b)(1) was inapplicable because failure to request an extension does not rise to the level of negligence required.

3. *In re Coats*, 214 B.R. 397 (October 21, 1997).

ISSUE: Whether exempting a debtor's student loans from discharge in a Chapter 7 proceeding would impose an undue hardship on the debtor and her dependents under § 523(a)(8)(B).

RULING: The court adopted the three pronged test set forth in *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2nd Cir. 1987), and found that all three prongs of the test were met in facts presented to the court in this instance (e.g., the debtor did not possess the present ability to pay, the debtor's future financial situation was uncertain, and that there was no fraud present in trying to discharge her student loans), and accordingly, discharged the student loan debt.

4. *In re Payne*, 215 B.R. 889 (November 13, 1997).

ISSUE: Whether a Chapter 7 debtor may avoid nonpossessory, non-purchase money liens held against a riding lawn mower, push mower, and hand tools pursuant to § 522(f) and under Oklahoma's exemption statutes, Okla.Stat. tit. 31 § 1, *et seq*.

RULING: The tools were not exempt under the "tools of the trade" exemption found in Okla.Stat. tit. 31 § 1(A)(6). Both of the lawnmowers were considered as "household and kitchen furniture held primarily for the personal, family, or household use of such person or a dependant of such person" as dictated under Okla.Stat. tit. 31 § 1(A)(3), and were therefore exempt based upon the facts of the case.

5. *In re Reconversion Technologies, Inc.*, 216 B.R. 46 (December 10, 1997).

ISSUE: Whether fees for various professionals were reasonable under § 330 of the United States Bankruptcy Code.

RULING: The court went through a detailed analysis of the facts presented, and

found that there was a benefit conferred to the estate, but that some of the billed charges were superfluous and unwarranted. The court made its decision by going through a detailed analysis of many relevant factors in determining the relative worth of work performed (e.g., the calculation of hourly rates, the difficulty of the case, the skill required to perform the certain duties, and many others), and concluded that fees were warranted, but they must be altered and reduced to fit the reasonableness requirements of § 330.

6. *In re Brooks*, 216 B.R.838 (January 5, 1998).

ISSUES: (1) Whether the debtor was eligible for relief under § 109(e) of the United States Bankruptcy Code because of a $250,000 debt to the IRS; (2) whether the debtor was precluded from re-litigating the issue of eligibility under the doctrine of *res judicata*, and (3) whether the debtor filed his Chapter 13 case in "good faith."

RULING: The court first held that the debt owed to the IRS was a liquidated, noncontingent, unsecured debt in excess of $250,000, and that the debtor may not "shoehorn" himself into a Chapter 13 bankruptcy merely because he disputed the amounts owed to the IRS. The court next held that the doctrine of *res judicata* set forth in *Nwosun v. General Mills Restaurants, Inc.*, 124 F.3d 1255 (10th Cir. 1997), prevented the re-litigation of the issue. The court further held that the Chapter 13 bankruptcy case was filed in "bad faith" because debtor was engaged solely in a two party dispute (Debtor v. IRS), and that there are other alternative forums better suited to resolve the dispute (U.S. Tax Court).

7. *In re Heidenreich*, 216 B.R. 61 (January 15, 1998).

ISSUE: Whether the Bankruptcy Court lacks the jurisdiction to determine a sum certain in a dischargeability proceeding under § 523(a)(4).

RULING: No. The Court concluded that "the equitable jurisdiction of the bankruptcy court which indisputably extends to determination of the dischargeability of a debt cannot be separated from the function of fixing the amount of nondischargeable debt," and that, "the rule generally followed by courts of equity that having jurisdiction of the parties to controversies brought before them, they will decide all matters in dispute and decree complete relief."

8. *In re Yates*, 217 B.R. 296 (February 12, 1998).

ISSUE: The issues presented to the court were whether the customary "flat-rate" fee of $1,300.00 for a "routine" Chapter 13 case should be raised without the necessity of a detailed fee application contemplated by F. Bankr. R. 2016; and whether the court should create a "sliding-scale" for awarding compensation to counsel for Chapter 13 cases.

RULING: The court held that it would not raise or lower the customary rate for Chapter 13 cases in the Northern District of Oklahoma, and that it would review each case in order to determine the reasonableness of the fee as dictated by § 330. If it is determined that the fees are unreasonable, an evidentiary hearing will be held, and detailed time records, while not required, will greatly aid in the court's ultimate decision. The court also held that it would not establish a "sliding scale" for awarding fees without the necessity of a detailed fee application.

9. *In re Herrig*, 217 B.R. 891 (March 3, 1998).

ISSUE: Whether credit card debt incurred through cash advances to pay gambling debt is nondischargeable under § 523(a)(2)(A).

RULING: After a detailed analysis of the factual circumstances surrounding the debt, the court concluded the debt was nondischargeable.

10. *In re Nichols*, 223 B.R. 353 (March 10, 1998).

ISSUE: Whether a Chapter 11 bankruptcy case filed in an effort to resolve a two party dispute (e.g., a divorce action) was filed in "good faith."

RULING: No. The court held that the issue of "good faith" is a matter left to the sound discretion of the bankruptcy judge, and that there are certain objective factors that aid in the final decision of the court. In this case more than one of these factors was present and the Court dismissed the case. The court also noted that "the use of a bankruptcy court to resolve a marital dispute is rarely if ever appropriate, and it is certainly not appropriate on the facts before it [in this case]." The case was dismissed.

11. *In re Schubert*, 218 B.R. 603 (April 10, 1998).

ISSUE: Whether a cause of action for undisclosed defects in a residence attaches to the properly claimed homestead exemption under Okla. Stat. tit. 31 § 1(A)(1) and is thus exempt under the statute.

RULING: No. The court concluded that the state court action did not attach to the residence because it did not fit the enumerated exemptions set forth in the statute, and that the damages sought in the suit were personal property (the seeking of punitive damages) and not real property or reimbursements for damages to real property, i.e., insurance money.

12. *In re McMasters*, 220 B.R. 419 (April 17, 1998).

ISSUE: Whether a judgment lien held by a Chapter 13 creditor may be avoided under § 522(f)(1)(A) despite a recent change to Oklahoma law which allows liens to attach to the homestead.

RULING: Yes. The court concluded that the Supreme Court case of *Owen v. Owen*, 500 U.S. 305 (1991), was controlling in the issue, and that "under the rationale of *Owen*, debtors may avoid liens upon property in order to avail themselves of the full benefit of the exemption even if the lien at issue is not avoidable under applicable state law." Thus, federal law trumps Okla. Stat. tit. 12 § 706(B)(2), which would have allowed the lien because it impairs the homestead exemption.

13. *In re Nichols*, 221 B.R. 275 (May 28, 1998).

ISSUE: Whether the estranged wife of the debtor should be awarded attorneys' fees and costs pursuant to Fed R. Bankr. P. 9011, Fed. R. Bankr. P. 7054, or § 105 (the courts inherent powers) after winning a motion to dismiss under 1112(b).

RULING: No. The court held that absent a statutory basis or an enforceable contract between the parties, each party pays his or her own fees and expenses in court. Rule 9011 is not applicable because the debtor's argument is not fraudulent or frivolous, and it is merely "colorful" or "novel," which the Tenth Circuit has held to be acceptable (*In Re Edmonds*, 924 F.2d 176, 181-182 (1991)). The court also held that the filing of the Chapter 11 did not rise to the level of vexatious, wanton, or oppressive behavior that warrants sanctions under § 105.

14. *In re Muskogee Environmental Conservation Co., Inc.*, 221 B.R. 526 (June 2, 1998)

ISSUE: Whether the creditors of a Chapter 11 estate should be allowed to take a deposition of and obtain the work files of the debtor's attorney.

RULING: No. The court concluded that the request of the deposition of debtor's counsel did not meet the three-pronged test as set forth in *Boughton v. Cotter Corp.*, 65 F.3d 823, 829 (10th Cir. 1995); and that the attorney-client privilege, as dictated by Okla. Stat. tit. 12 § 2502 *et seq*. and Oklahoma case law was not waived for any of the reasons that were put forth in plaintiffs' argument.

15. *In re Hatley*, 227 B.R. 753 (June 18, 1998); *affirmed*, *In Re Hatley,* 227 B.R. 757 (10th Cir. BAP (Okla.) 1998); *affirmed*, *In re Hatley,* 194 F.3d 1320 (10th Cir. (Okla.) 1999).

ISSUE: Whether a business owned by two people was a corporation or a partnership; and whether a debt owed by one of the partners to the other was nondischargeable under § 523(a)(4).

RULING: The court held that the business was a partnership under Okla. Stat. tit. 54 § 206 and the elements proscribed in Oklahoma case law. The court also concluded that it was bound by the Tenth Circuit's holding that the UPA (Oklahoma Uniform Partnership Act) does not create the kind of fiduciary duty which was intended for § 523(a)(4), and that neither Oklahoma's version of the UPA, nor Oklahoma case law establishes the fiduciary relationship. Thus, the debt was dischargeable in the Chapter 7 bankruptcy.

16. *In re Hermann*, 221 B.R. 944 (July 7, 1998).

ISSUE: Whether the debtors would be able to discharge their past due income taxes in a Chapter 7 bankruptcy when their original due date was more than three years old, and they improperly filed for an extension.

RULING: No. The court concluded that the improperly filled out extension, Form 4868, was not void *ab initio* because such an extension is granted automatically unless the IRS notifies to the contrary, thus placing the outstanding income taxes within the time frame for non-discharge as proscribed under § 523(a)(1)(A). The court also concluded that it would be inequitable to allow a discharge in this

situation because the debtors had already benefitted from the extension they now wished to say was void.

17. *In re Kusler*, 224 B.R. 180 (July 10, 1998).

ISSUE: Whether certain fees should be awarded to a Chapter 7 Trustee under § 330 when the only asset of the Chapter 7 estate was a vehicle sold at an auction, and the proceeds were used to pay the professionals, leaving no money left for the creditors of the estate.

RULING: The court held that such a situation was to be strictly scrutinized, and that evidentiary hearings would be set for the trustee, the law firm, and the accountant of the debtor to present a detailed billing schedule, and how their services benefitted the estate in some way.

18. *In re Tulsa Litho Co.*, 232 B.R. 240 (August 3, 1998); *affirmed*, *In re Tulsa Litho Co.,* 229 B.R. 806 (10th Cir. BAP (Okla.) 1999).

ISSUE: Whether there was a preferential transfer under § 547(b) between a paper supplier and a paper retailer; and whether or not the defense of "ordinary course of business" as proscribed by § 547(c)(2) was valid when it was the first business transaction between the two companies, the payment was made by a cashier's check, and the terms of the contract (including the amount) were not met with full compliance.

RULING: The court concluded that while all the elements of § 547(b) were met, the trustee could not avoid the transfer because the subjective and objective tests for a § 547(c)(2) defense were both met. The court noted that first transactions are acceptable for the defense (subjective), that a cashier's check was not in and of itself dispositive of a preferential transfer (again subjective), and that there was nothing to suggest that the money which was transferred was unusual in the paper industry (objective).

19. *In re Robinson*, 225 B.R. 228 (September 15, 1998).

ISSUE: Whether a secured creditor in a Chapter 13 case, which involved a motor-vehicle, could receive an administrative priority claim under § 503(b)(1)(A) when the creditor neither requested nor was granted adequate protection under § 361.

RULING: No. The court held that the stipulated agreement between the parties which determined the priority of the claim was invalid because it violated the purpose and spirit of the Bankruptcy Code.

20. *In re Limited Gaming of America, Inc.*, 228 B.R. 275 (December 18, 1998).

ISSUE: The issues presented to the court were substantive consolidation of two bankruptcy estates and confirmation of a Chapter 11 plan.

RULING: The court concluded that substantive consolidation of the two estates was proper. The court also concluded that the proposed plan comported with § 1129 after a systematic analysis of each element of the rule.

21. *In re Klaus*, 228 B.R. 475 (January 11, 1999).

ISSUE: Whether a debtor may subdivide property whose primary use has been commercial, and in the process carve out a fully exempt homestead under Okla. Stat. tit. 31 § 1, *et seq*.

RULING: No. The court held that the land was a "mixed-use" property, and that it was fully subject to Okla. Stat. tit. 31 § 2(C), which limits such exemptions to $5,000 when 25% of the total square footage of the improvements of the claimed homestead is used for business purposes.

22. *In re Woodward*, 229 B.R. 468 (January 27, 1999).

ISSUE: Whether an attorney, who performed work for a Chapter 7 debtor's counsel, should have his fees disgorged as a result of his failure to disclose the receipt of fees in compliance with § 329(a).

RULING: Yes. The court concluded that § 329(a) is to be strictly construed, and that it is clear that the section includes disclosure of any compensation shared with another attorney because "Section 329 is a disclosure provision designed to prevent bankruptcy attorneys from extracting more than their fair share from whatever is necessary to obtain counsel of choice and avoid unfavorable bankruptcy proceedings." The court also concluded that a failure to disclose such information could warrant serious sanctions if other evidence demonstrated bad faith on behalf of the attorney in question.

23. *In re Bison Resources, Inc.*, 230 B.R. 611 (February 24, 1999).

ISSUE: Whether the court should grant relief from the automatic stay provisions of § 362 in order to allow a state court action against the debtor to proceed to trial.

RULING: Yes. The court held that the decision should be made on a case-to-case basis, and that certain objective factors help aid in the final decision. The facts in this case presented many of these factors and found that cause existed for the lifting of the automatic stay so that the state court action could proceed.

24. *In re Witt*, 231 B.R. 92 (March 10, 1999).

ISSUE: Whether the Religious Freedom Restoration and Charitable Donation Protection Acts preclude the avoidance of pre-petition transfers to religious charities under § 544(a) or § 548(a)(2) of the U.S. Bankruptcy Code for fraud were constitutional.

RULING: Yes. The court concluded that neither act violated the establishment clause of the First Amendment nor were they in derogation of the tenets of Due Process as set forth in the Fifth Amendment; and that the Trustee was precluded from avoiding such transfers under these Acts when a debtor's contributions do not exceed 15% of his or her annual income, or when the contributions are consistent with the debtor's prior charitable practices.

25. *In re Abboud*, 232 B.R. 793 (April 16, 1999); *affirmed*, *In Re Abboud*, 237 B.R. 777 (10th Cir. BAP (Okla.) 1999)

ISSUE: Whether the doctrine of *res judicata* precludes the bankruptcy court from re-examining the validity of a state court judgement against a Chapter 13 debtor.

RULING: The court held that *res judicata* is only to be applied when the underlying judgment is final. Under Oklahoma law, *res judicata* is not applicable when the appellate court has not decided the case. However, the court held that because the debtor was essentially seeking a review of a judgment determined by Oklahoma state law, the court was prevented from reviewing such matters because of the *Rooker-Feldman* doctrine, which prevents an inferior federal court from reviewing a state court decision.

26. *In re Woodward*, 234 B.R. 519 (May 11, 1999)

ISSUE: Whether liens for rendered medical services were properly perfected pre-petition of a Chapter 7 bankruptcy under Okla. Stat. tit. 42 § 44(a); and whether a second filing of the liens post-petition to remedy defects could be avoided by the trustee under § 549.

RULING: Yes. The court concluded that the liens were not properly perfected under Oklahoma statutory law, and that Okla. Stat. tit. 42 § 44(a) conditions are to be strictly construed in such matters. The court also concluded that there is no language in the statutory law which allows the lien filed post-petition to relate back to the date of the first, and therefore they are avoidable by the trustee under § 549, and there is no exception created by § 362(b)(3) or § 546(b) that would allow the liens to stand.

27. *In re Muskogee Environmental Conservation, Co.*, 236 B.R. 57 (July 14, 1999)

ISSUE: Whether a Chapter 11 bankruptcy petition of a corporation should be dismissed under § 1112(b) for cause or "bad faith."

RULING: The court held that the question is to be answered on a case-to-case basis, and that certain objective factors aid in the final decision. This case presented many of these factors (e.g., debtors' possession of one asset, litigation against a single creditor, and the avoidance of a supersedeas bond), and therefore should be dismissed.

28. *In re Prince*, 236 B.R. 746 (August 2, 1999).

ISSUE: Whether the debtors in a Chapter 13 bankruptcy should be allowed to avoid a lien on their homestead under § 522(f)(1) of the United States Bankruptcy Code.

RULING: Yes. The court concluded that the lien should be avoided because it was a judicial lien, and that it impaired the debtors' homestead exemption. However, the court also held that, upon the timely motion of the lienholder the avoidance order will not be entered on real estate records until the order of discharge has been entered.

29. *In re Polishuk*, 243 B.R. 408 (August 24, 1999); affirmed, *Polishuk v. Polishuk (In re Polishuk),* District Court No. 99-CV-901-C(J) (slip op. October 19, 2000): See Bankruptcy Docket No. 201.

ISSUE: Whether debts in the form of attorneys' fees (as proscribed under Okla. Stat. tit. 43 § 110(C)), applicable interest, and credit card debt assigned to the debtor in a divorce decree is dischargeable under § 523(a)(5); and whether those debts are entitled to priority status under § 507.

RULING: Yes. The court held that the *Rooker-Feldman* doctrine did not apply simply because a state court had concluded that the debt was in the nature of support, and that the debts incurred from the divorce decree met the two-part test constituting "alimony to, maintenance for, or support of the plaintiff" thus making them nondischargeable. The court also held that identical language governing § 523(a)(5) and § 507 allows the same two-part test for assigning priority claim status as well, and since the debts were found to be in the nature of support they are also entitled to priority status.

30. *In re Claxton*, 239 B.R. 598 (September 27, 1999).

ISSUE: Whether a manufactured mobile home was a fixture and thus subject to a lien created by a mortgage on the land where it was placed under Okla. Stat. tit. 60 § 7.

RULING: The court concluded that the evidence indicated that there was an actual annexation to the real property; that their use of the property was suitable for the fixture; and that the debtors had the requisite intent to permanently secure the fixture to the real property. Thus, the mobile home was found to be a fixture under Oklahoma law.

31. *In re The Music Store, Inc.*, 241 B.R. 752 (November 13, 1998).

ISSUE: Whether a *nunc pro tunc* application of an accountant should be approved due to the simple negligence (e.g., inexperience in Chapter 11 bankruptcies) of the debtor's attorney in not timely filing an application for employment.

RULING: The court held that simple neglect will not justify *nunc pro tunc* approval of a debtor's application for employment of a professional.

32. *In re Sims*, 241 B.R. 467 (November 23, 1999), *affirmed*, *In re Sims,* District Court No. 00-CV-25-BU(M) (slip op. September 19, 2000); See Bankruptcy Docket No. 93.

ISSUE: Whether an inherited Individual Retirement Account was exempt under Oklahoma's law, specifically Okla. Stat. tit. 31 § 1(A)(20).

RULING: The court concluded that the IRA underwent fundamental changes when it was inherited from his father's estate, and that it was no longer an asset that was "qualified for tax exemption purposes," which took it out from under the umbrella of qualification under Okla. Stat. tit. 31 § 1(A)(20).

33. *In re Merrill*, 246 B.R. 906 (March 27, 2000); affirmed, *In re Merrill,* 252 B.R. 497 (10th Cir. BAP (Okla.) 2000).

ISSUE: Whether debts which an ex-spouse was obligated to pay under the terms of a divorce decree (automobile insurance, life insurance, alimony, and interest on support obligations) were dischargeable under § 523(a)(5); and whether a withdrawal of funds from a child's trust fund was nondischargeable under § 523(a)(4).

RULING: The court held: (1) that debts incurred from the divorce decree met the two-part test constituting "alimony to, maintenance for, or support of the plaintiff" thus making them nondischargeable; and (2) that the debtor violated his fiduciary duty by defalcation by withdrawing money from his child's trust, thus barring him from discharging the debt in bankruptcy.

34. *In re BTS, Inc.*, 247 B.R. 301 (April 7, 2000).

ISSUE: Whether a Chapter 11 proceeding should be dismissed or converted into a Chapter 7 proceeding under § 1112(b)(2) when the bankruptcy estate desires a dismissal to pursue state court litigation.

RULING: The court concluded that when the bankruptcy estate's assets are at issue in state court litigation, conversion (rather than dismissal) is appropriate so that a disinterested trustee could protect those assets in the litigation; and that conversion is also necessary to prevent the loss of any preferential claims that may exist.

35. *In re Wheatley*, 251 B.R. 430 (July 26, 2000).

ISSUE: The court was petitioned to determine the post-judgement interest on state judicial judgments owed to creditors by the debtor in bankruptcy.

RULING: The court held that such determinations are governed by Oklahoma law, namely Okla. Stat. tit. 12, § 727. However, since the claims were awarded in different years the court must determine the interest according to the provisions of that statute for the respective year of the claim, along with any retroactive provisions of later amendments to the statute. The court then analyzed the provisions and case law involving Okla. Stat. tit. 12, § 727 and concluded that: (1) prior to January 1, 1998, the interest rate for post-judgement interest did not vary, (2) interest upon judgements did not compound prior to January 1, 1998, and (3) an award of attorney's fees and costs did not accrue interest prior to January 1, 2000. The court then applied these findings to each claim at issue.

36. *In re Hoover*, 254 B.R. 492 (October 23, 2000).

ISSUE: Whether, under § 1322(e) of the Bankruptcy Code, a secured creditor has the right to receive interest on an arrearage over and above any such right contained in the agreement between the parties.

RULING: No. The court determined that in enacting § 1322(e), Congress had expressly overruled *Rake v. Wade*, 508 U.S. 464 (1993)(holding that such interest is allowable). Therefore, the court concluded that the terms of the agreement will control, and that the contract between the debtor and creditor did not have any such provision. However, such provisions, if included, are still subject to applicable state law. The Court also noted that § 1322(e) is only applicable to loan agreements entered into after October 22, 1994.

37. *In re Polishuk,* 258 B.R. 238 (January 31, 2001).

ISSUE: Whether, after a conversion to a Chapter 7, the Court should award attorney's fees to counsel representing the debtor while the case was pending as a Chapter 11 and Chapter 13, and/or to the attorney who represented debtor in a state court action for divorce.

RULING: The Court held attorney fees and expenses should not be awarded to the attorney representing the debtor in the bankruptcy case. The Court found that the attorney's services provided no benefit to the estate, as there was no realistic possibility of reorganization under Chapter 11 or 13. Furthermore, the Court ruled that time spent in

litigation with the debtor's ex-wife was of no benefit to the bankruptcy estate. With respect to the attorney who represented debtor in his divorce, the Court found that a portion of the services performed by said attorney should be compensated for his services from the bankruptcy estate. The bankruptcy case could not proceed until the marital assets of the parties were divided in the divorce action was completed. Thus completing the divorce proceeding was a benefit to the bankruptcy estate.

38. *In re Oklahoma Trash Control, Inc.,* 258 B.R. 461 (February 1, 2001).

ISSUE: Whether an executory contract, which the debtor wants to assume, was effectually terminated prior to the filing of bankruptcy.

RULING: An executory contract terminated prior to the filling of bankruptcy cannot be resurrected and assumed. The Court held the contact had been effectively terminated by the debtor's repudiation of the contract prior to the filing of bankruptcy. It was found that the repudiation was effected by both the declaration of the debtor to end the contract and his subsequent actions making it impossible for the contract to be performed. As such, the other party was relieved from its duties under the contract, and the contract was no longer executory in nature. Therefore, the Court found that there was no contract to be assumed, and denied the debtor's motion for assumption.

39. *Trisza Leann Ray, Plaintiff, v. The University of Tulsa, Works & Lentz, Inc., an Oklahoma professional corporation, and Works & Lentz of Tulsa, Inc., an Oklahoma professional corporation, Defendants (In re Ray),* 262 B.R. 544 (May 3, 2001), Adv. No. 00-0157-M.

ISSUE: Whether the obligation owed by a student to a university for unpaid tuition on open account constitutes " . . an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, . . ." for purposes of § 523(a)(8) of the Bankruptcy Code.

RULING: No. Relying heavily upon the decision of the United States Court of Appeals for the Second Circuit in *Cazenovia College v. Renshaw (In re Renshaw),* 222 F.3d 82 (2d Cir. 2000), the Court ruled that the mere execution of a class enrollment card which contained a statement that the student promised to "pay the total fee assessed based upon this enrollment plus an interest rate of 1.5% monthly on balances over thirty days past due" did not create an educational loan under § 523(a)(8).

40. *In re Lively*, 266 B.R. 209 (June 11, 1998).

ISSUE: Whether a debtor in a Chapter 11 case may make payments on selected pre-petition debt without court authorization.

RULING: No. Relying upon Tenth Circuit precedent (*see In re B & L Oil Company*, 782 F.2d 155, 158 (10th Cir.1986)), the Court held that a debtor may not make payments upon pre-petition debt in the absence of court authorization. The Court rejected the argument that the payments constituted "adequate protection" under § 363 of the Bankruptcy Code, as the creditors receiving payments had made no request for adequate protection. The Court also rejected the argument that these payments were made in the ordinary course of the debtors' business. The Court ordered the debtors to recover said payments "or risk dismissal, appointment of a trustee or conversion to Chapter 7 of the Bankruptcy Code."

41. *The Cadle Co. v. Stephen M. King d/b/a Global Capital Resources (In re King),* 272 B.R. 281 (January 16, 2002)

ISSUE: Whether the debtor would be denied a Chapter 7 discharge pursuant to § 727(a)(4)(A) by having material omissions or misstatements in his Schedules and Statement of Financial Affairs.

RULING: Yes. The Court concluded that the debtor "made no less than five separate material omissions or misstatements in his schedules and Statement." The Court went on to say "[w]hether his conduct resulted from actual intent to defraud his creditors or from a reckless indifference to the truth," the result was the denial of a discharge under § 727(a)(4).

42. *In re Durability, Inc.,* 273 B.R. 647 (February 15, 2002).

ISSUE: Whether a trustee may assume a contract of insurance under § 365 of the Bankruptcy Code.

RULING: Debtor, a corporation, obtained a $500,000 policy of insurance upon its chief executive officer. Upon the filing of an involuntary bankruptcy petition against the debtor, the bankruptcy trustee sought to assume the policy. At the time of the Court's ruling, the insured had died. The Trustee sought to assume the policy in order to collect the death benefits. The Trustee argued that the policy had not lapsed, and that, in the alternative, even if a lapse had occurred, certain conduct by the insurance company compelled the conclusion that the Trustee be allowed to assume the contract. The Court, after a detailed analysis of the facts of the case, held the insurance policy lapsed prior to the filing of bankruptcy and denied the Trustee's motion to assume.

43. *In re Hoyt*, 277 B.R. 121 (April 25, 2002).

ISSUE: Whether a Chapter 7 debtor's alleged non-disclosures rendered his obligations under guarantees of debts non-dischargeable based upon section 523(a)(2)(A) (fraud) and section 523(a)(6) (willful and malicious injury).

RULING: Although the Court recognized that a debtor's partial disclosures may trigger a duty to disclose, it found no such partial disclosures here. The Court held that a "representation must be one of existing fact and not merely an expression of opinion, expectation or declaration of intention." Because the Court found that the debtor's non-disclosure regarding billing related to his intentions and/or future events, the debtor's non-disclosure was not held to be a representation under section 523(a)(2)(A). The Court then applied the "totality of the circumstances" approach, and found the debtor not to have the requisite intent to deceive under section 523(a)(2)(A). Finally, the Court held that, even assuming the debtor violated the Bank's Security Agreement, such a violation alone did not satisfy the stringent standard of section 523(a)(6).

44. *In re Smith*, 278 B.R. 532 (May 30, 2002).

ISSUE: Whether debtor's alleged false representations within a loan application rendered the resulting debts non-dischargeable under section 523(a)(2)(B).

RULING: The Court adopted the test for a creditor's reasonable reliance under section 523(a)(2)(B) set forth in *In re Cohn*, 54 F.3d 1108, 1117 (3rd Cir. 1995), which employs an objective standard and looks to 1) the creditor's standard practices, 2) the standards of the creditor's industry, and 3) the surrounding circumstances at the time of the debtor's application. Because the Court found that the creditor-Bank did not reasonably rely upon the debtor's application (e.g., failed to investigate several red flags, including large, unsubstantiated interest in partnerships, and failed to present evidence regarding industry standards), the Court held the debts to be dischargeable.

45. *In re Universal Factoring Co., Inc.*, 279 B.R. 297 (June 12, 2002).

ISSUES: On Motion to Dismiss, whether 1) complaints failed to plead fraud with particularity (Rule 9(b)), 2) Amended Complaint failed to incorporate claims from First Complaint, and 3) Amended Complaint was filed after the statute of limitations had expired.

RULING: The Court first held that the defendant's failure to assert a defense under Rule 9(b) with or before its answer operated as a waiver of such a defense. The Court further held that the Pretrial Order (already filed) superceded all of the previous pleadings and necessarily negated the Trustee's failure to incorporate the claims from the First Complaint. The Court finally concluded that the Amended Complaint was effectively filed within the statute of limitations. Because Rule 15(c), governing the relation back of amended complaints, contemplates the *conduct* of the parties, and because the allegations within the Amended Complaint were part of the same pattern of conduct (a series of transfers) asserted within the First Complaint, the Court held that the Amended Complaint related back to the original.

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